No. 45014-3-II

Court of Appeals
DIVISION II
STATE OF WASHINGTON

L&P DEVELOPMENT, L.L.C., a Washington limited liability company; PACIFIC RESOURCE DEVELOPMENT, INC., a Washington corporation; PARKER FAMILY L.L.C., a Washington limited liability company; RTB, INC.,; RICHARD T. BRUNAUGH and AMANDA BRUNAUGH, husband and wife, and the marital community composed thereof; LYLE E. FOX and VICKY J. FOX, husband and wife, and the marital community composed thereof; PAUL E. GREEN and ANNETTE GREEN, husband and wife, and the marital community composed thereof; DONALD C. LINKEM and ELIZABETH A. LINKEM, husband and wife, and the marital community composed thereof; DAVID A. PARKER and VELMA L. PARKER, husband and wife, and the marital community composed thereof; PAUL E. WILSON and KELLY I. WILSON, husband and wife, and the marital community composed thereof,

APPELLANTS,

v.

UNION BANK, N.A., as successor in interest to the FDIC as Receiver of Frontier Bank,

RESPONDENT

APPELLANTS' REPLY BRIEF

Owens Davies Fristoe Taylor & Schultz, P.S.
Matthew B. Edwards
1115 West Bay Drive, Ste. 302
Olympia, WA 98502
(360) 943-8320
WSBA No. 18332

Budsberg Law Group, PLLC
Benjamin J. Riley
Brian L. Budsberg
1115 West Bay Drive, Ste. 302
Olympia, WA 98502
(360) 943-8320
WSBA No. 34949
WSBA No. 11225

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III. INTRODUCTION

L&P DEVELOPMENT, L.L.C., Pacific Resource Development, Inc., Parker Family L.L.C., RTB, Inc., Richard T. Brunaugh and Amanda Brunaugh, Lyle E. Fox and Vicky J. Fox, Donald C. Linkem and Elizabeth A. Linkem, David A. Parker and Velma L. Parker, Paul E. Wilson and Kelly I. Wilson (hereinafter "Appellants") submit this reply brief.

Under the plain language of the Bank-drafted Deed of Trust, the Deed of Trust secured performance of the individuals' guarantees. The Bank's non-judicial foreclosure of the Deed of Trust therefore precluded it from obtaining deficiency judgments against the Guarantors. Any language in the Bank-drafted loan documents that purport to waive the individuals' defense to enforcement of those guarantees based on the bank's non-judicial foreclosure is plainly unenforceable.

The trial court's granting of summary judgment to the Bank should be reversed. The Court should remand this case to the trial court with an instruction to grant summary judgment to the guarantors, and to award the guarantors their attorney's fees.

IV. ANALYSIS

A. The Deed of Trust secured performance of the Appellants' guarantees.

The Deed of Trust plainly secured performance of the Appellants' guarantees. The Court should reject the Bank's argument to the contrary.

The Bank-drafted Deed of Trust explicitly states that it secures performance of any and all obligations under any "Related Document:"

> THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS AND THIS DEED OF TRUST.

CP 22. (Emphasis added).

The Bank defined the term "Related Documents" to include guarantees:

> **Related Documents.** The words 'Related Documents' means all promissory notes, credit agreements, loan agreements, guarantees, security agreements, mortgages, deeds of trust, security deeds, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that environmental indemnity agreements are not 'Related Documents' and are not secured by the Deed of Trust.

CP 28. (Emphasis added). Because the Deed of Trust defines Related Documents as including the Appellants' guarantees, the Deed of Trust secures performance of any and all obligations arising under the guarantees. This language could not be clearer.

The Bank points to subsequent language which is contained in the Bank-drafted Deed of Trust to argue that the Deed of Trust only secures performance of the payment of the debtor's indebtedness. See Bank Brief, p. 14-16. The Court should reject the Bank's arguments for either of two reasons.

First, none of the subsequent language the Bank points to contradicts the plain language set forth above. The Bank-drafted Deed of Trust explicitly states that it secures performance of any and all obligations under Related Documents, and defines Related Documents to include the Appellant's guarantees. There is nothing in the subsequent language in the Deed of Trust that contradicts this, or suggests that the Deed of Trust only secures the debtor's indebtedness, or does not secure performance under the Related Documents.

Second, the Bank-drafted Deed of Trust explicitly permits the Bank to declare a default under the Deed of Trust, and to foreclose upon the Deed of Trust, based solely upon the conduct of a guarantor:

> **Events of Default.** Each of the following, at lenders' option, shall constitute an event of default under the Deed of Trust:
>
> ...
>
> **Compliance Default.** Failure to comply with any other term, obligation, covenant or condition contained in this Deed of Trust, the note or in any of the Related Documents.

...

> **Events Affecting Guarantor.** Any of the preceding events occurs with respect to any guarantor of any of the indebtedness or any guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any guarantee of the indebtedness.

CP 25.

In sum, the Deed of Trust explicitly secures performance of the Appellant's guarantees. There isn't the slightest ambiguity about it. Even if there were ambiguity, it would have to be resolved against the Bank which drafted the pertinent language.

The Bank's Deed of Trust secured performance of the Appellant's guarantees.

B. By non-judicially foreclosing on the Deed of Trust which secured performance of the guarantees, the Bank gave up its right to maintain an action on those guarantees.

Second, by non-judicially foreclosing on the Deed of Trust which secured performance of the guarantees, the Bank gave up its right to maintain an action on those guarantees.

RCW 61.24.100(1) states the general rule:

> Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.

This statute reflects the long recognized policy underlying the non-judicial foreclosure act: a lender who non-judicially forecloses on a Deed of Trust may not thereafter maintain an action to collect any deficiency on any obligation secured by that Deed of Trust. See *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 916 n.8, 154 P.3d 882 (2007) ("Washington law provides that no deficiency judgment may be obtained when a trustee's deed is foreclosed.").

In its analysis of the statute, the Bank focuses upon RCW 61.24.100(3). That statute provides:

> This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
>
> ***
>
> (c) Subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

(Emphasis added).

Based on the second half of § (c) , the Bank argues that it may take a deficiency judgment against these Guarantors because the Guarantors were given the notices specified by RCW 61.24.042. But the rule set forth in § (c) is not a rule of unlimited applicability. It applies "subject to this section."

The rule of subsection (3)(c) is itself subject to the other rules set forth in the section. One such rule is set out at RCW 61.24.100(10):

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.

RCW 61.24.042(10) states that a lender may bring a deficiency action against that borrower guarantor if, meaning, "on condition that," the debtor guarantee is not secured by a Deed of Trust.[1] The doctrine of *expressio unius est exclusion alterius*, which means "to express or include one thing implies the exclusion of the other," supports this interpretation of this statute.[2] Because the Legislature conditioned the lender's ability to bring a deficiency action against a guarantor on the guarantee ***not*** being secured by the judicially foreclosed-upon Deed of Trust, the Legislature intended to exclude a lender from being able to bring a deficiency action against a guarantor after judicially foreclosing upon the Deed of Trust that secured the guarantee.[3]

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[1] Definition of "if", Dictionary.com, http://dictionary.reference.com/browse/if (last visited November 20, 2013)("I'll go if you do.").

[2] *State v. Ortega,* 172 Wn.2d 116, 124 at ¶ 12, 297 P.3d 57 (2013)(quoting Black's Law Dictionary 661 (9th Ed. 2009)).

[3] In *Ortega*, a unanimous Supreme Court cited this doctrine as supporting its conclusion that "the express authority to rely on the request of another officer making an arrest for a traffic infraction indicates that such authority does not extend to other nonfelony offenses. *See Staats v. Brown*, 139 Wn.2d 757, 768, Wn.3d 991 P.2d 615 (2000)(finding that the exceptions to the present requirement under RCW 10.31.100 are exclusive)."

The Bank argues that subsection 10 "affirmatively provides protection of the lender's right to pursue obligations unrelated to the debt that was secured." Brief, p. 23. That is an absurd construction of subsection 10. An obligation that is not secured by a Deed of Trust is not subject to the Deed of Trust Act at all. There would be no reason for the Legislature to bury a provision allowing a lender to pursue claims for payment of indebtedness not secured by a Deed of Trust in the midst of an Act that governs the procedure applicable to and the effect of the foreclosure of debt secured by Deeds of Trust.

Moreover, the Guarantors' construction of this statute harmonizes its provisions, while the Bank's construction of this statute does not. In RCW 61.24.100(6), the Legislature recognized that Guarantors may execute Deeds of Trust specifically to secure performance of their own Guarantees. But the Legislature permits a lender to foreclose such a Guarantor – granted Deed of Trust only obtain a deficiency judgment for the decrease in the fair value of the property caused by waste, or the wrongful retention of any rents, insurance proceeds or condemnation awards. *Id.*

Why would the Legislature restrict a lender's ability to take a deficiency judgment against a Guarantor willing to step up and give extra

security, but subject Guarantors who do not provide extra security to full liability for any deficiency?

The Legislature plainly did not intend to do this. Instead, the Legislature intended to maintain the quid pro quo that has been the hallmark of nonjudicial foreclosures since their inception: Where a lender nonjudicially forecloses on a Deed of Trust, it is barred from taking a deficiency judgment on any obligation secured by that Deed of Trust, whether the obligation secured is an obligation of the borrower or the guarantor. RCW 61.24.100(10) (applying to obligations of both borrowers and guarantors.)

The Legislature has thus created three classes of obligors:

- Borrowers, whose obligation to repay is secured by a Deed of Trust that is foreclosed on nonjudicially. A lender who chooses to nonjudicially foreclose the Deed of Trust may not take a deficiency judgment against the borrower. RCW 61.24.100(1).

- Guarantors, whose obligation to repay is secured only by a Deed of Trust given by the borrower. A lender who chooses to nonjudicially foreclose the Deed of Trust may not take a deficiency judgment against the guarantor. RCW 61.24.100(1),(10).

- Guarantors, whose obligation to repay is secured not only by borrower's Deed of Trust, but also by the guarantor's own Deed of Trust. A lender who chooses to nonjudicially foreclose the borrower's Deed of Trust may take a deficiency judgment against such a guarantor, but only to the extent of the decrease in the fair value of the property caused by waste, or the wrongful retention of any

> rents, insurance proceeds, or condemnation awards. RCW 61.24.100(6).

Moreover, nonjudicial foreclosures are entirely optional. The decision to pursue them occurs solely at the choice and discretion of the lender. Lenders remain free to bring independent actions against guarantors, to judicially foreclose, or to seek the appointment of a receiver. In any of those cases, the lender will receive the right to obtain a judgment against both the borrower and any guarantor for the full amount of any deficiency that remains after foreclosure.

Lenders who choose to nonjudicially foreclose enjoy the speed and low cost of that procedure, but they also waive any right to obtain a deficiency against either a borrower or a guarantor whose obligation was secured by the nonjudicially foreclosed Deed of Trust. Lenders who choose to nonjudicially foreclose may obtain a deficiency judgment only against guarantors whose obligation to repay is secured not only by the borrower's Deed of Trust, but also by a guarantor-granted Deed of Trust, and then only to the extent of the decrease in the fair value of the property caused by waste, or the wrongful retention of any rents, insurance proceeds, or condemnation awards.

The Legislature's intent is perfectly clear. But to the extent the Court may find itself harboring doubts about that intent, it must construe

this statute strictly in favor of obligors, and against lenders, "because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, at 105, ¶ 13, 297 P.3d 677 (2013).

Finally, the Bank, pointing to a Bill Report for the 1998 amendments to the Act, claims legislative history supports the notion that lenders may sue guarantors for a deficiency. The Bank did not raise any question of legislative history until its reply brief to the trial court, so it is precluded from raising this issue now.

In any event, the Bank's argument fails to address the real issue. The question is not whether there are circumstances in which a guarantor may be sued for deficiency, as the Bill Report suggests. There plainly are. Rather, the question presented in this case is *whether a guarantor may be sued for deficiency* ***after*** *the non-judicial foreclosure of a deed of trust that has secured its guarantee.* If a lender takes advantage of the efficiency provided by Washington's Deed of Trust Act to non-judicially foreclose upon a deed of trust that secures a guarantee, RCW 61.24.100(10) precludes that lender from maintaining a deficiency action against the guarantor.

In sum: (1) the Deed of Trust plainly secured performance of the Appellant's guarantees; and (2) the Deed of Trust Act clearly precludes the Bank, having nonjudicially foreclosed the Deed of Trust, from taking a deficiency judgment against any obligation – including Appellants' guarantees – secured by the Deed of Trust.

C. By inserting boiler plate language into its documents, the Bank did not cause the guarantors to waive their statutory rights.

Finally, by inserting boiler plate language into its documents, the Bank did not cause the guarantors to waive their statutory rights.

RCW 61.24.100 contains mandatory language which specifically states that the deficiency judgment "shall not be obtained" against a borrower or guarantor. Further, in RCW 61.24.010, the Legislature specifically identified those protections that could be waived by the parties. See RCW 61.24.100(4) (Legislature allows parties to contract for deadline to file a deficiency action later than the Act's statute of limitation); (7) (Legislature authorizes parties to contract to preserve right to deficiency against the guarantor in instances where a deed in lieu of foreclosure is given); (9) (Legislature authorizes party to contractually prohibit a lender from seeking a deficiency); (11) (Legislature authorizes parties to waive a guarantors objection to impairment of collateral by the trustee sale). These are the only circumstances in which the Legislature

has authorized parties to contractually modify the protections afforded obligors by the Deed of Trust Act.

Both the Washington Supreme Court, and this Court, have recently addressed this issue. The Washington Supreme Court rebuffed a bank's efforts to argue that boiler plate language it had placed in its loan documents caused an obligor to waive the protection the Act provided against nonjudicial foreclosure of agricultural land. *Schroeder v. Excelsior Management Group,* 177 Wn.2d 94, 106-107, 297 P.3d 677 (2013). "We will not allow waiver of statutory protections lightly." *Schroeder,* 177 Wn.2d at 107, quoting *Bain v. Metro Mortgage Group,* 175 Wn.2d 83, 108, 285 P.3d 34 (2012).

Similarly, in *First Citizens Bank and Trust Company v. Reikow,* ___ Wn.App. ___, ___P.3d ___ (November 12, 2013), this Court recently rejected a bank's effort to enforce an obligor's purported waiver of their statutory rights under the Act. Addressing a claim of waiver based on substantially identical boiler plate language, the Court reasoned that a broad boiler plate waiver contained in a guaranty's fine print cannot defeat a guarantor's rights under the Act:

> We note that, under Washington law, "a guaranty agreement should receive a fair and reasonable interpretation reflecting the purpose of the agreement and *the right of the guarantor not to have his obligation enlarged. Old Nat'l Bank of Wash. v. Seattle Smashers*

> *Corp.*, 36 Wn.App. 688, 691, 676 P.2d 1034 (1984) (emphasis added). Our Supreme Court has shown great reluctance to allow waiver of the statutory requirements governing nonjudicial foreclosure. *Schroeder v. Excelsior Management Group, LLC,* 177 Wn.2d 94, 106-107, 297 P.3d 677 (2013) (stating that "[we] will not allow waiver of [chapter 61.24 RCWs] protections lightly" and citing cases (quoting *Bain v. Metro. Mortg. Grp.,* 175 Wn.2d 83, 108, 285 P.3d 34 (2012)). A valid waiver, furthermore, requires "intentional abandonment or relinquishment of a known right, and intent to waive must be shown by unequivocal acts or conduct which are inconsistent with any intention other than to waive." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev. Inc.,* 143 Wn.App. 345, 361, 177 P.3d 755 (2008) *appeal after remand,* 160 Wn.App. 728 (2011). Thus, were we to find the issue to be relevant to this dispute, **the broad, boilerplate waiver in the guaranties' fine print can hardly defeat the explicit and specific provisions of RCW 61.24.100(5), which plainly aim to protect guarantors from having their obligations enlarged.**
>
> *Id.* at fn.4 (emphasis added).

Lenders have complete control over the language which they choose to insert into loan documents. If a lender could defeat the substantial limitation which the Legislature imposed on lenders who make the choice to nonjudicially foreclose their Deeds of Trust pursuant to the Act, the protections which the Legislature gave to borrowers and guarantor pursuant to that Act would be rendered nugatory. The broad boiler plate waiver in the guarantees' fine print cannot defeat the explicit and specific provisions of the Act, which are plainly aimed to protect

guarantors from having their obligations enlarged. The Court should reject the Bank's argument on this issue.

D. The Court should award the guarantors their reasonable attorneys fees.

Finally, the Court should award the guarantors their reasonable attorneys fees.

The guarantors requested attorneys fees based on the attorneys fee clauses in the guaranties in their opening brief. See opening brief, p. 14 - 15. The Bank has requested that it be awarded its reasonable attorneys fees pursuant to these if it is the substantially prevailing party. See Bank's brief, p. 35 – 36.

Both sides thus agree that the substantially prevailing party is entitled to an award of its reasonable attorneys fees. Assuming the guarantors prevail, the Court should award the guarantors their reasonable attorneys fees, both below and on appeal.

V. CONCLUSION

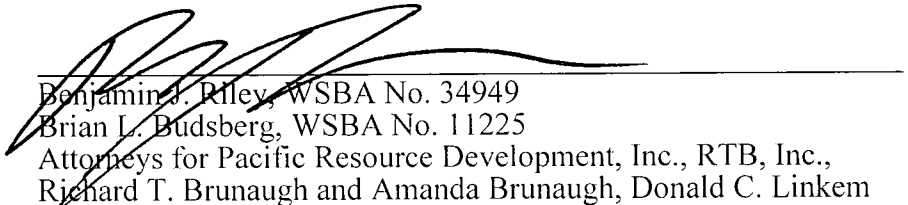
The Bank-drafted Deed of Trust plainly secured performance of these guarantor's obligations under their guarantees. The Bank's nonjudicial foreclosure of the Deed of Trust securing these guarantor's performance of the Deed of Trust therefore precludes the Bank from obtaining a deficiency judgment against the guarantors. The boiler plate

fine print waivers in the Bank's Deed of Trust cannot defeat the restriction on the Bank's ability to gain a deficiency judgment which the Legislature granted as part of the Act.

The trial court's grant of a summary judmgent to the Bank should be reversed. This Court should reverse, and remand with instructions to the trial court to dismiss the Bank's claims, and to award the guarantors all of the attorney's fees they reasonably incurred both before the trial court and on appeal.

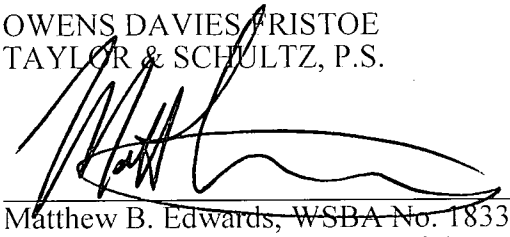
Dated this 21st day of November, 2013.

BUDSBERG LAW GROUP, PLLC



Benjamin J. Riley, WSBA No. 34949
Brian L. Budsberg, WSBA No. 11225
Attorneys for Pacific Resource Development, Inc., RTB, Inc., Richard T. Brunaugh and Amanda Brunaugh, Donald C. Linkem and Elizabeth A. Linkem, David A. Parker and Velma L. Parker, Paul E. Wilson and Kelly I. Wilson

OWENS DAVIES PRISTOE
TAYLOR & SCHULTZ, P.S.



Matthew B. Edwards, WSBA No. 18332
Attorneys for Lyle E. Fox and Vicky J. Fo

CERTIFICATE OF SERVICE

I certify that on the 21st day of November, 2013, I caused a true and correct copy of this Appellants' Reply Brief to be served on the following in the manner indicated below:

Benjamin J Riley
Budsberg Law Group, PLLC
PO Box 1489
Olympia WA 98507-1489
Via Hand Delivery

Thomas Henry Oldfield
Oldfield & Helsdon PLLC
1401 Regents Blvd Ste 102
PO Box 64189
University Place WA 98464-0189
Via Regular U.S. Mail

Averil Budge Rothrock
Schwabe Williamson & Wyatt PC
1420 5th Ave Ste 3400
Seattle WA 98101-4010
Via Regular U.S. Mail

Matthew Turetsky
Schwabe Williamson & Wyatt PC
1420 5th Ave Ste 3400
Seattle WA 98101-4010
Via Regular U.S. Mail

Milt Reimers
Schwabe Williamson & Wyatt PC
1420 5th Ave Ste 3400
Seattle WA 98101-4010
Via Regular U.S. Mail

Dated this 21st day of November 2013, at Olympia, Washington.

By: _____
Matthew B. Edwards